11-20-98

(1)

No. 98-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF MARYLAND,
Petitioner,

v.

JOHNNY WALKER,
Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During the trial of Johnny Walker on charges of sexual child abuse and second degree sexual offense, the State of Maryland asked the trial court to exclude Walker's family members from the courtroom during the testimony of the two victims, aged twelve and seventeen. The victims had told the prosecutor that the relatives had threatened and intimidated them and that the victims were concerned about testifying in their presence. After hearing from defense counsel, the trial court balanced Walker's right to a public trial against the importance of enabling the witnesses to testify freely, without fear of intimidation or retribution, and concluded that the limited exclusion was warranted. For the remainder of the trial, Walker's relatives were permitted in the courtroom. The state court reversed Walker's convictions, ruling that the trial court abused its discretion under *Waller v. Georgia*, 467 U.S. 39 (1984), in excluding the family members from the courtroom.

The question presented is:

Did the exclusion of Walker's family members from the courtroom for the limited duration of the victims' testimony violate Walker's Sixth Amendment right to a public trial?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland.

OPINIONS BELOW

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari, *Walker v. State*, 351 Md. 5, 715 A.2d 964 (1998), is reproduced in Appendix A. (App. 1a).

The reported opinion of the Court of Special Appeals of Maryland, *Walker v. State*, 121 Md. App. 364, 709 A.2d 177 (1998), reversing the judgment of the Circuit Court for Baltimore City, is reproduced in Appendix B. (App. 2a-22a).

The October 21, 1997, unreported ruling of the Circuit Court for Baltimore City, Maryland in *Walker v. State*, Criminal Case Nos. 196285024, 26, granting the State's request to exclude Walker's relatives from the courtroom during the testimony of the two child victims, is reproduced in Appendix C. (App. 23a-26a).

STATEMENT OF JURISDICTION

The decision of the Court of Special Appeals of Maryland reversing Walker's conviction was filed on May 5, 1998. The order of the Court of Appeals of Maryland denying the State's petition for writ of certiorari was filed on August 24, 1998. This petition is filed within ninety days of the denial of the petition for writ of certiorari, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Respondent, Johnny Walker, lived with his girlfriend, Zelma Brown, and her two daughters, Tuleeya and Salauna, between 1985 and 1996. (App. 3a). After Walker and Brown terminated their relationship, Tuleeya disclosed to Brown that Walker had sexually abused her for several years. (*Id.*). The abuse began with Walker touching Tuleeya when she was eight years old. (*Id.*). When Tuleeya was nine years old, Walker made her touch him and then perform oral sex on him. (*Id.*). Walker put his finger in Tuleeya's mouth and told her to "suck real hard." (Tr. 10/21/97, at 24, 27-28).[1] He then placed his penis in her mouth and told her to do the same thing to his penis. (*Id.*). Other times, he tried to force his penis into Tuleeya's vagina but it would not fit. (*Id.* at 24). This

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[1] "Tr. 10/21/97" refers to the transcript of the trial proceedings on October 21, 1997.

caused Tuleeya to become sore and to bleed. (*Id.*).

The abuse occurred every other day, with Tuleeya performing oral sex on Walker and with Walker attempting to penetrate Tuleeya vaginally with his penis. (*Id.*). Walker would ejaculate on Tuleeya's face and clothing. (*Id.* at 34-35). On one occasion, Walker performed oral sex on Tuleeya. (*Id.* at 24). Walker told her "that he was showing her things that [she] would have to do when [she] got older." (*Id.* at 32-33).

By the time she was fourteen years old, Tuleeya was physically capable of resisting Walker's advances. (App. 4a). She had never reported the abuse while it was occurring because she was scared and because Walker told her that she would get into trouble if she told anyone. (Tr. 10/21/97, at 30-31). Tuleeya finally told her mother when Walker left the family home. (*Id.* at 31).

Salauna, Tuleeya's younger sister, was nine years old when she first told her mother that Walker had abused her. (App. 4a). She testified that "a long time ago," before she was in school, Walker took her into the bathroom, covered her eyes, inserted his penis into her mouth, and pretended to brush her teeth. (*Id.*; Tr. 10/21/97, at 89). When Walker removed his penis from her mouth, Salauna could hear him zipping his pants. (*Id.*).

Walker was tried in the Circuit Court for Baltimore City on charges of child abuse and second degree sexual offense with respect to both victims. (App. 2a). On the first day of trial, prior to jury selection, the prosecutor asked the trial court to exclude Walker's relatives from the courtroom during the testimony of the two victims:

> [I]nasmuch as the case involves the testimony of child victims, the oldest victim is now 17, the youngest victim is 12, I would ask that there not be

> other people in the courtroom, particularly, particularly members of the Defendant's family. The children are very intimidated and there have been situations in the past since the case has come in where there have been lots of family members and family members have said things to them, and they feel very frightened and very intimidated by that.

(App. 4a). The court reserved ruling on the State's exclusion request. (*Id.*).

The next day, before trial began, the prosecution renewed its request to have Walker's relatives excluded from the courtroom when the children testified. (App. 5a). The prosecutor again advised the court that the children felt intimidated by Walker's relatives and had expressed concerns about having to testify in their presence. (*Id.*). Defense counsel objected, stating that she did not "believe that inside the courtroom they pose any threat," nor did she "believe that there ever has been a threat by the family with respect to these particular witnesses, and that's not their purpose for being here." (App. 5a-6a).

The trial court responded by balancing Walker's right to a public trial against the importance of ensuring that the witnesses testify freely and without fear of intimidation. (App. 6a-7a). Noting that the nature of the allegations in this case were "incredibly disruptive and destructive to a family," the court expressed concern that the adults could have made the children feel intimidated and threatened "as to what the consequences of their testimony may be perceived to be by the family of the Defendant." (App. 7a). The judge also considered the age of the victims and the desirability of having live testimony over "video testimony." (*Id.*). The trial court concluded that "the benefit of permitting the Defendant's family to be present

is far outweighed by the benefit to the jury of having live . . . witness testimony." (*Id.*).

The trial judge thereupon excused Walker's relatives from the courtroom during the testimony of the two victims. (*Id.*). After the victims testified, the State presented the testimony of Detective Edward Scott Jones, who interviewed the victims after the abuse was reported to the police, and Zelma Brown, the victims' mother. (Tr. 10/21/97, at 65-68, 77-91). During this testimony and for the remainder of the trial, Walker's family was permitted in the courtroom.

Zelma Brown testified that Tuleeya told her that she had remained silent about the abuse because she was afraid of Walker. (*Id.* at 83). Brown described Walker as a "bully." (*Id.* at 84). Brown recounted a conversation she had had with Walker when Tuleeya was eleven, wherein Walker insisted that Tuleeya needed birth control. (*Id.* at 87). According to Brown, Tuleeya frequently barricaded the entrance to her room with her furniture. (*Id.* at 88). Throughout this time period, Walker's relatives would come to the home on a regular basis and the children would go to Walker's parents' home. (*Id.* at 99-100). The defense offered no evidence.

Walker was convicted of child abuse and second degree sexual offense with respect to both victims. (App. 2a). He was sentenced to concurrent terms of fifteen years for child abuse and twenty years for second degree sexual offense. (*Id.*).

Walker appealed to the Court of Special Appeals of Maryland, which reversed his convictions. The court adverted to the "overriding interest" test for total courtroom closure enunciated by this Court in *Waller v. Georgia*, 467 U.S. 39 (1984). (*Id.*). In the Court of

Special Appeals' view, the trial judge based his decision to exclude Walker's relatives on "a vague proffer of intimidation by members of the defendant's family," and should have, instead, personally interviewed the victims, the relatives, or both "to ascertain the accuracy or validity of the State's proffer." (App. 11a). The state intermediate appellate court concluded that the trial court had abused its discretion under *Waller* in excluding Walker's relatives from the courtroom during the testimony of the victim witnesses. (App. 12a).

The State of Maryland filed a petition for writ of certiorari in the Court of Appeals of Maryland, contending that the Court of Special Appeals erred in treating the limited exclusion in this case as a complete courtroom closure, applying the *Waller* standard, and concluding that the trial court had abused its discretion. The Court of Appeals denied the State's petition for writ of certiorari on August 24, 1998. (App. 1a).

REASONS FOR GRANTING THE WRIT

A. The Important Question Presented by This Case Has Never Been Answered by This Court.

This Court has never addressed the important issue presented by this case—whether a defendant's Sixth Amendment public trial right is violated by the exclusion of some courtroom spectators for a limited duration, where the trial court finds a substantial reason for the limited exclusion and where the courtroom remains open to everyone else at all times. This Court has used various formulations to describe the gravity of the interest that will justify courtroom closures, such as "compelling," *Globe*

Newspaper Company v. Superior Court, 457 U.S. 596, 607 (1982); "cause shown that outweighs the value of openness," *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984); and "overriding," *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Those cases involved multi-day, total courtroom closures and do not address the limited exclusion of courtroom spectators at issue here. With this case, the Court can address the recurring dilemma of what standard governs partial courtroom exclusions and thereby resolve the substantial conflict among the lower courts regarding the applicability of *Waller*, *Press-Enterprise*, and *Globe Newspaper* to such cases.

In *Press-Enterprise*, this Court held that the press and public have a First Amendment right to attend the voir dire stage of a criminal trial. 464 U.S. at 508-10. Four months later, in *Waller*, this Court held that the Sixth Amendment guarantee to a public trial extends to suppression hearings. 467 U.S. at 47. The closures in both of those cases were extreme in scope and duration; all members of the public were excluded and the closures spanned several days. The test developed in *Press-Enterprise* and applied in *Waller*—that the party seeking closure must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, and the trial court must consider reasonable alternatives—*Waller*, 467 U.S. at 48, is plainly inapplicable to the myriad of partial and limited courtroom closures that occur daily during criminal trials for an infinite variety of reasons.

A less stringent standard than the first prong of the *Waller* test for exclusions short of complete closures is necessary to prevent the lower courts from vacating

otherwise valid convictions. Indeed, many routine exclusions, such as those due to witness sequestration, security measures, and courtroom overflow, probably do not even constitute "closures" in the first place, as that term was contemplated to mean in *Waller*, *Press-Enterprise*, and *Globe Newspaper*. Where a defendant has received a fair trial, requiring the government to meet the exacting "overriding interest" test every time certain members of the public are excluded from the courtroom should not be condoned.[2]

B. The Lower Courts Are in Conflict Regarding the Proper Standard to Apply to Partial Closures.

Although this Court has held that a party seeking complete closure of a proceeding must show that the measures taken were necessary to serve an overriding interest, a majority of lower courts hold that, "where proceedings are only partially closed, the test is less stringent; a 'substantial' rather than a 'compelling' reason is required where at least some access by the public is retained."[3] *United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir.), *cert. denied*, 118 S. Ct. 78 (1997). The underlying rationale for this less stringent standard is that "the more extensive the closure, the greater must be the

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[2] This is particularly so given that public trial violations are not susceptible of a harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

[3] By the term "partial closure," the State of Maryland means the exclusion of certain members of the public from the courtroom, which is otherwise open to the public and press.

gravity of the required interest and the likelihood of risk to that interest." *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2380 (1998); *see also United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995) (exclusion of defendant's sister from courtroom during victim's testimony to protect minor from emotional harm); *United States v. Farmer*, 32 F.3d 369, 371-72 (8th Cir. 1994) (partial, temporary closure of courtroom during testimony of 17-year-old sexual abuse victim where victim feared retaliation by defendant and his family); *Woods v. Kuhlman*, 977 F.2d 74, 76-78 (2d Cir. 1992) (exclusion of members of the defendant's family for the duration of one witness' testimony, where witness claimed to be frightened); *United States v. Galloway*, 963 F.2d 1388, 1390 (10th Cir.) (partial closure of courtroom during testimony of 18-year-old rape victim in view of victim's age and nature of crimes), *cert. denied*, 506 U.S. 957 (1992), *vacated on other grounds*, 56 F.3d 1239 (10th Cir. 1995); *United States v. Sherlock*, 962 F.2d 1349, 1356-57 (9th Cir. 1989) (defendants' families excluded during rape victim's testimony after some of them were observed laughing and making faces), *cert. denied sub nom. Charley v. United States*, 506 U.S. 958 (1992); *Nieto v. Sullivan*, 879 F.2d 743, 751-54 (10th Cir.) (exclusion of defendant's relatives during witness' testimony upheld where witness had previously expressed fear of defendant and his family), *cert. denied*, 493 U.S. 957 (1989); *Douglas v. Wainright*, 739 F.2d 531, 532-33 (11th Cir. 1984)(per curiam) (exclusion of all members of public except for press and families of victim and defendant during testimony of State's key witness for purpose of protecting witness from embarrassment), *cert. denied*, 469 U.S. 1208 (1985); *Bell v. Jarvis*, 7 F. Supp. 2d 699, 702 (E.D.N.C.

1998) (limited closure of courtroom during victim's testimony to protect her from embarrassment); *Cosentino v. Kelly*, 926 F. Supp. 391, 393-94 (S.D.N.Y.) (exclusion of wives of murder defendants and son of one defendant at second trial after outburst by family members at first trial when verdict was read), *aff'd*, 102 F.3d 71 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1821 (1997); *Ex parte Judd*, 694 So. 2d 1294, 1296 (Ala. 1997) (exclusion of general public during testimony of minor child sexual offense victim); *Commonwealth v. Martin*, 653 N.E.2d 603, 606 (Mass. App. Ct.) (exclusion of defendant's mother during voir dire and testimony of witness out of concern for psychological well-being of minor complainant), *review denied*, 654 N.E.2d 1202 (Mass. 1995); *People v. Chan*, 656 N.Y.S.2d 22, 27-28 (App. Div. 1997), *aff'd*, 692 N.E.2d 558 (N.Y. 1998) (limited courtroom closure during victim's testimony where purpose was to protect minor from emotional harm).

Another faction of lower courts adhere to the more demanding *Waller* test in cases of partial closures. These courts, like the Court of Special Appeals of Maryland below, apparently believe that because this Court has not spoken on the distinction between partial and total closures, the *Waller* standard applies each and every time a defendant asserts a public trial violation on the basis that someone has been excluded from the courtroom. *See, e.g., United States ex rel. Morgan v. Lane*, 705 F. Supp. 410, 412-15 (N.D. Ill. 1989) (partial closure during testimony of 16-year-old victim of rape, sexual assault and incest), *aff'd*, 897 F.2d 531 (7th Cir. 1990) (mem.); *People v. Benson*, 621 N.E.2d 981, 982-84 (Ill. App. Ct. 1993) (closure of courtroom during testimony of eight-year-old sex offense victim), *appeal denied*, 631 N.E.2d 711 (Ill.

1994); *People v. Morgan*, 504 N.E.2d 172, 176-77 (Ill. App. Ct.) (in rape prosecution, partial closure during testimony of three minor witnesses to protect their psychological and physical well-being), *appeal denied*, 511 N.E.2d 434 (Ill.), *cert. denied*, 484 U.S. 866 (1987); *State v. Guajardo*, 605 A.2d 217, 220-21 (N.H. 1992) (closure during testimony of 14-year-old victim of felonious sexual assault); *People v. Homan*, 654 N.Y.S.2d 925, 926 (App. Div.) (closure during testimony of nine-year-old sexual offense victim), *appeal denied*, 682 N.E.2d 989 (N.Y. 1997); *State v. Fayerweather*, 540 A.2d 353, 354 (R.I. 1988) (partial closure during testimony of six-year-old molestation victim).

The cases clearly conflict with each other and the resultant confusion as to the appropriate governing standard necessitates guidance by this Court. Because of the regularity with which partial closure issues arise in criminal trials, a pronouncement by this Court as to the burden the government must meet to justify such closures is essential.

C. The Decision of the Court of Special Appeals of Maryland Is Erroneous.

The exclusion of Walker's relatives from the courtroom for a limited duration constituted, at most, a *partial* courtroom closure, for which only a substantial reason had to be alleged. The prosecutor's proffer that the two young victims were intimidated by Walker's relatives and had expressed concerns about testifying in their presence constituted a substantial reason for the family members' exclusion from the courtroom during the

victims' testimony.[4]

Ignoring a record that contains the arguments of counsel, the trial court's factual findings, and a well-reasoned ruling, the Court of Special Appeals of Maryland held that the trial court abused its discretion in failing to conduct an evidentiary hearing before ruling on the closure issue. The court suggested, for example, that the trial judge should have interviewed the victims and/or the persons sought to be excluded in order to "make more than a general finding" that the requested exclusion was warranted. Assuming that the Sixth Amendment even requires such a hearing, the factual proffers and legal arguments of counsel, coupled with the trial court's findings and ruling, were equivalent to an evidentiary hearing. In any event, even if the Court of Special Appeals of Maryland were correct in concluding that more fact finding was needed to justify the exclusion, it is imperative that this Court enunciate the proper standard to be applied, that is, that the State of Maryland need only set forth a substantial rather than an overriding reason for the limited exclusion or "partial" closure.

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[4] The State of Maryland by no means suggests that it would not prevail on the merits under the more stringent *Waller* test. Indeed, the partial closure in this case passed muster under that standard for *total* courtroom closure: The closure was limited in scope and duration, narrowly tailored to protect the State's interest in having its child witnesses testify truthfully and free of intimidation, and the trial court specifically articulated on the record the interest sought to be protected. The trial court considered other alternatives, such as testimony by closed circuit television, but determined that it was in Walker's interest to have live testimony. Thus, under either standard, the State of Maryland believes it should have prevailed.

CONCLUSION

The "Sixth Amendment right to a public trial is not absolute and must, on occasion, give way to other rights and interests." *Waller v. Georgia*, 467 U.S. at 45. One such interest is "safeguarding the physical and psychological well-being of a minor witness." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607. As demonstrated above, a majority of the circuits have relaxed the requisite interest that must be shown to justify an exclusion short of total courtroom closure, requiring a "substantial" rather than a "compelling" or "overriding" reason for the limited exclusion. The exclusion of Walker's relatives for the limited duration of the victims' testimony for the purpose of insulating the children from intimidation by these relatives, where the courtroom remained otherwise open to the public, was well supported. Where the goals of a public trial have been met, the exclusion of a few courtroom spectators, for a limited duration, should not result in the reversal of valid convictions. For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

**Counsel of Record*
November 20, 1998

APPENDIX

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APPENDIX A:

Reported order of the Court of Appeals of Maryland, filed August 24, 1998, *Johnny Walker v. State of Maryland*, 351 Md. 5, 715 A.2d 964 (1998) 1a

APPENDIX B:

Reported opinion of the Court of Special Appeals of Maryland, *Johnny Walker v. State of Maryland*, 121 Md. App. 364, 709 A.2d 177 (1998) 2a

APPENDIX C:

Discussion between trial court and counsel on courtroom closure issue and ruling of the Circuit Court for Baltimore City, Maryland, issued October 21, 1997, *Johnny Walker v. State of Maryland*, Criminal Case Nos. 196285024, 26 ..... 23a

APPENDIX A

STATE OF MARYLAND	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	Petition Docket No. 225
JOHNNY WALKER	*	September Term, 1998 (No. 1612, Sept. Term, 1997, Court of Special Appeals)

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

Date: AUG 24 1998

APPENDIX B

JOHNNY WALKER

v.

STATE OF MARYLAND

No. 1612, Sept. Term, 1997.

Court of Special Appeals of Maryland.

May 5, 1998

Submitted before MURPHY, C.J., and DAVIS and HARRELL, JJ.

DAVIS, Judge.

Appellant Johnny Walker was tried and convicted by a jury in the Circuit Court for Baltimore City of child abuse and second degree sexual offense committed on two daughters of his former girl friend. He was thereafter sentenced to concurrent terms of fifteen years for sexual child abuse and twenty years for the second degree sexual offense. From these convictions, he appealed to this Court raising the following questions, which we restate for clarity:

I. Did the lower court deprive appellant of his

constitutional right to a public trial by excluding all of appellant's family members from the courtroom during the testimony of the two alleged victims?

II. Did the lower court err by refusing appellant's request for a jury instruction that the State must prove that the crime against Salaunah occurred between 1992 and 1996 as alleged in the indictment?

III. Did the lower court err by not ruling on appellant's objection to the prosecutor's jury argument that appellant was an "animal"?

IV. Did the lower court err by overruling appellant's objection to the prosecutor's rebuttal argument to the jury to "remember that the only evidence you will receive in this case has come from the State" and that the State's "evidence remains uncontroverted"?

Because we answer question I in the affirmative, we reverse the judgment of the lower court and we do not reach questions II and IV; however, we address question III for the guidance of the lower court on remand.

FACTS

For more that ten years, appellant had a romantic relationship with the mother of the two victims. At the same time, according to Tuleeya, the eldest of the two daughters—who was seventeen years old at the time of trial—appellant began, when she was eight years old, touching and feeling her inappropriately and, when she was nine and ten years old, he demanded that she perform fellatio on him. Because of his inability to penetrate the

young victim, appellant was unsuccessful in his attempts to engage in coitus with the victim. Appellant ultimately relented when the victim was fourteen years old, because she was then more physically able to resist his sexual advances.

Twelve year old Salaunah testified that appellant took her into the bathroom, ostensibly to brush her teeth, but instead covered her eyes with his hand and then inserted something that "sort of felt like when you put your hand in your mouth. It felt like skin." Thereafter, Salaunah heard appellant pulling up his pants and then the noise of his zipper being pulled up. This occurred before the witness began attending school.

The mother of the two victims, Zelma B., testified that, approximately two days after she ended her relationship with appellant, Tuleeya advised her that appellant had sexually abused her. Salaunah previously had related the incident to her in which appellant had told the younger daughter to close her eyes so that he could brush her teeth, but, when the witness (Zelma B.) confronted appellant, he had denied that the incident occurred.

Prior to trial, the prosecutor asked that members of appellant's family be excluded from the courtroom during the testimony of the two victims because they had said things to the two victims and "they [the two victims] feel very frightened and very intimidated by that." The court indicated when the witnesses were called to testify, "I'll hear from [appellant's counsel] and I'll deal with it at that time." Additional facts will be supplied in conjunction with the discussion that follows.

In granting the request to exclude appellant's family members from the courtroom, the following colloquy transpired:

> [PROSECUTION]: Your Honor, at this time, the State would like to renew its motion to have the courtroom emptied of any of the [appellant's] relatives or—with respect to this case, inasmuch as the victims are child witnesses and they've had some problems in the past in terms of intimidation by the family of the [appellant]. So, I would just ask that this courtroom be cleared of them at the time Tuleeya and Salaunah . . . testify with respect to this, this matter.
>
> THE COURT: How old are the witnesses, [prosecutor]?
>
> [PROSECUTION]: The oldest witness is 17 and the youngest is 12.
>
> THE COURT: And are the witnesses related to the [appellant's] family?
>
> [PROSECUTION]: Well, the [appellant] is the stepfather of the witnesses. The mother of the children was in a relationship with the [appellant] for 10 years. He lived in the home during that period of time.
>
> THE COURT: And have the children expressed—the witnesses expressed any concern to you about testifying in the present (*sic*) of the [appellant's] family?
>
> [PROSECUTION]: Yes, they have, Your Honor. They have, and that's why I'm making the request of the Court, because they have expressed concerns in terms of having to testify in their presence.
>
> THE COURT: [Appellant's Counsel], do you wish to be heard?

[APPELLANT'S COUNSEL]: Except that we would object. We believe that these witnesses are not of tender years. And if the State felt there was [sic] some problems, then made arrangements to have [sic] testify via the TV camera. But this is an open proceeding. My client's family has been very supportive throughout this whole situation. They are here, they've always been here. I don't believe that inside the courtroom they pose any threat. We don't believe that there ever has been a threat by the family with respect to these particular witnesses, and that's not their purpose for being here. If these witnesses made allegations, then now's the time to express them in front of—in court and in an open courtroom. We believe that this should be an open proceedings and that their ages, Your Honor, would make them competent witnesses and, as I stated earlier, that there's nothing that would prevent them from testifying in open court.

THE COURT: Okay. Well, certainly the [appellant] has a right to a public trial and the public has a right to attend the trial, and the [appellant's] family is part of the public. I do think, however, the Court is obliged to assure that witnesses are permitted to testify freely—

Are you having a problem, [prosecutor]?

[PROSECUTION]: —thank you, Your Honor.

THE COURT: —testify freely and without any fear of intimidation. And I understand that in a case such as this where families are essentially—wind up pitted against one another as a result of these allegations which are incredibly disruptive and destructive to a family that opinions can overflow on the witness and

make the witness, whether the witness is a child or an adult, feel intimidated and feel threatened in some way, not only in the courtroom itself but after the proceedings are over, as to what the consequences of their testimony may be perceived to be by the family of the [appellant].

Considering all of that and considering the young age of the witnesses, even though they are old enough and competent, and also considering the fact that the quality of the witness's testimony is—it is preferable, I think, under any circumstances to have live witness testimony before a jury to video testimony. And the benefit of permitting the [appellant's] family to be present is far outweighed by the benefit of the jury—of having live—and the [appellant], for that matter—of having live witness testimony.

I'm going to grant the State's motion and request that members of the [appellant's] family be excused from the proceedings during the testimony of the child witnesses. Thank you.

[PROSECUTION]: Thank you, Your Honor.

Stating that he was deprived of his right to a public trial, appellant asserts that the court's decision to exclude his family, during the testimony of the alleged victims was prejudicial error. According to appellant, the trial court, by not finding that closure was "essential" and not attempting narrowly to tailor the exclusion, did not meet the requirements of *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Appellant avers that the trial court, without considering any other evidence, accepted the State's proffer as true. In addition, appellant contends, the trial court's findings were not specific enough for us to determine, on appeal, whether its order

was proper.

The Sixth Amendment to the U.S. Constitution guarantees an accused the "right to a speedy and public trial." *Cox v. State*, 3 Md.App. 136, 139, 238 A.2d 157 (1968). The privilege of the public to attend trials is not, however, unrestricted. *Ex Parte Sturm*, 152 Md. 114, 122, 136 A. 312 (1927). "In determining whether any part of the public should be excluded from the trial of a criminal case, some discretion must be allowed the trial [c]ourt." *Dutton v. State*, 123 Md. 373, 387, 91 A. 417 (1914).

Articulating the purpose of the public trial requirement, the Court of Appeals, citing to *Cooley's Constitutional Limitations*, page 312, stated that it

> . . . is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly met with if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.

Dutton, 123 Md. at 388-89, 91 A. 417.

In *Waller*, the Supreme Court held that "the right to an open trial may give way in certain cases to other rights or interests." *Id.* 467 U.S. at 45, 104 S.Ct. at 2215. The Court has also opined that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be

> articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984). In other words, the party seeking the exclusion "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48, 104 S.Ct. at 2216.

The Supreme Court, in concluding that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court," addressed the effect of permitting a child witness to testify on closed-circuit television and the effect this procedure had on the defendant's Sixth Amendment right to confront witnesses against him. *Maryland v. Craig*, 497 U.S. 836, 853, 110 S.Ct. 3157, 3167, 111 L.Ed.2d 666 (1990). The Court noted that the State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment is a compelling one," *id.* 497 U.S. at 852, 110 S.Ct. at 3167 (citations omitted), and that "'[m]any States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures.'" *Id.* 497 U.S. at 853, 110 S.Ct. at 3167 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1022-23, 108 S.Ct. 2798, 2804, 101 L.Ed.2d 857 (1988)).

The Supreme Court, in discussing the use of closed-circuit television, however, held that the State must make an "adequate showing of necessity" for its use. *Craig*, 497 U. S. at 855, 110 S.Ct. at 3169. The Court held that the trial court must determine whether use of the procedure is necessary to protect the welfare of the child victim, and must find that the child victim "would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Craig*, 497 U. S. at 855-86, 110 S.Ct. at 3168-69. The Court concluded that, if the trial court determines the child victim is traumatized by the courtroom generally, rather than by the presence of the defendant, the denial of face-to-face confrontation would be unnecessary because "the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present." *Id.* 497 U.S. at 856, 110 S.Ct. at 3169.

On remand from the Supreme Court, the Maryland Court of Appeals announced certain guidelines for the trial judge to follow in determining whether the use of closed-circuit television was warranted. The Court of Appeals held that the trial judge ordinarily should determine the question of the child's ability to testify in front of the defendant "by personally observing and interviewing the child, on the record, either in or outside the courtroom." *Craig v. State*, 322 Md. 418, 433, 588 A.2d 328 (1991). The Court of Appeals held that the "prudent trial judge" should consider expert testimony when offered as an aid in determining whether to use closed-circuit television, but that such testimony is not essential to the court's determination. *Id.* at 426-28, 588 A.2d 328. MARYLAND CODE (1957, 1996 Repl.Vol., 1997 Supp.), Art. 27, § 774(c), prescribing procedures for the use of closed-circuit television, provides that the judge

"may" observe and question the child either inside or outside the courtroom and hear testimony of a parent or a custodian of the child or any other person including a person who has dealt with the child in a therapeutic setting.

We are mindful that the instant case does not involve the testimony of a child abuse victim via closed-circuit television nor does it involve removal of all of the spectators from the courtroom. The public may only be excluded, however, "pursuant to a narrowly tailored order necessary to protect an overriding State interest." *Watters v. State*, 328 Md. 38, 45, 612 A.2d 1288 (1992). It may be, in the case *sub judice*, that the State could have established an overriding State interest sufficiently important to outweigh the defendant's right to face his accusers had there been efforts to adduce evidence beyond a vague proffer of intimidation by members of the defendant's family. As the Court of Appeals concluded in *Craig* and as § 774(c) of Art. 27 prescribes, Tuleeya and her sister, Salaunah, could have been observed or questioned either inside or outside of the courtroom regarding the alleged intimidation. Similarly, any other member of the family of the victims who were privy to the alleged intimidation could have been examined by the trial judge.

It is incumbent upon the trial judge to make more than a general finding that all children suffer trauma when testifying or, as in this case, not to encroach upon the defendant's right of confrontation by clearing the courtroom of all of the defendant's family members without conducting an examination to ascertain the accuracy or validity of the State's proffer. We hold that, in the absence of such evidence, we cannot determine from

this record whether the trial judge's order was narrowly tailored to the exigencies of the case at hand and, as a consequence thereof, the court abused its discretion.

ii

During closing argument, the prosecutor argued:

[PROSECUTION]: . . . Think about it—indicates, indicates to you what [sic] these children were repeatedly sexually molested by that [appellant].

The evidence reveals to you that—that he's an animal.

[APPELLANT'S COUNSEL]: Objection, Your Honor.

[PROSECUTION]: That he's a pervert and that he sexually molested babies. I want you to concentrate on that evidence and I want you right now to—about the testimony of Tuleeya and Salaunah. . . . I want you to close your eyes right now and to reflect upon the testimony of Tuleeya and Salaunah. Juror Number 1, can you hear the silent screams of Tuleeya as she asks for help? She's only eight years old—

Juror Number 2, can you hear the silent screams of Tuleeya as she turns 10 years of age and the [appellant] forces his way into the bedroom and places his penis in her mouth? Juror Number 3, can you hear the silent screams of a baby that's only 10 years old when the person she calls Daddy places his penis in her vagina and it hurts, and she starts to bleed and she cries and no one comes in assistance?

Juror [sic] Number 4 and 5, can you see, can you see Tuleeya as the [appellant] ejaculates his sperm all over her face - her cries for help go unanswered? Juror Number 7, can you see the baby Tuleeya as she

> pushes her bureau against the door to protect herself? But there's no protection for her. The [appellant] gets in and he abuses her again, and he[r] cries for help go unanswered.
>
> Juror [sic] Number 8 and 9, can you hear Tuleeya as her screams for help become more and more—because she's learned that no one listens to her screams for help? Jurors Number 10 and 11, can you hear the cries of Salaunah as the [appellant] places his, his penis in her mouth on the pretense of brushing her teeth?
>
> Juror Number 11, can you hear Salaunah as she tells her mother about - and her mother does absolutely nothing? Juror Number [sic] 11 and 12, can you hear—screams—

Appellant complains that the trial court, by never ruling on his objection and permitting the State to continue its argument, implicitly gave approval to the State's characterization of appellant as an "animal." Such approval, appellant contends, was prejudicial error. Appellant avers that the State's characterization was not an isolated incident, as it also referred to him as a "pervert." According to appellant, the State's comments amounted to "an appeal to passion that was calculated to unfairly prejudice [him]." As a result, he was deprived of his right to be tried based on facts, instead of emotions. Although we need not reach this issue because of our disposition of issue I, we address the issue, nonetheless, because we are troubled by the state of the record before us.

The leading case in Maryland on improper argument of counsel is *Wilhelm v. State*, 272 Md. 404, 326 A.2d 707 (1974). There, the prosecutor, in referring to the murderer of a Baltimore County police officer, argued to the jury,

"the State feels *this is the Jury's chance* as individuals and collectively as citizens of Baltimore County—*we hear the hue and cry of police protection*—we feel *this is your occasion to do something about it.*" *Id.* at 407, 326 A.2d 707. The Court of Appeals, citing *Commonwealth v. Feiling*, 214 Pa. Super. 207, 252 A.2d 200 (1969), observed:

> Although appeals to prejudice and passion are not to be approved, we have held that a District Attorney in his arguments, within proper limits, may argue for law and order and remind the jury of the danger to the community posed by persons prone to resort to violence. We hold that those limits were not exceeded in the present case although the District Attorney's remarks were directed to the individual jurors as members of the community. Generally *it is for the trial judge to determine whether such remarks are so prejudicial as to require a new trial on that ground alone*, or whether their effect was sufficiently attenuated by the rest of the argument as to have no effect on the verdict.

Wilhelm, 272 Md. at 433, 326 A.2d 707 (emphasis added; citations omitted).

In affirming Wilhelm's conviction, the Court of Appeals noted that counsel for Wilhelm requested no cautionary instruction to the jury nor was any given. Counsel, however, had made a motion for a mistrial that was denied.

In addition to whether a cautionary instruction to disregard unwarranted remarks and conduct of a prosecuting attorney had been given, citing *Contee v. State*, 223 Md. 575, 165 A.2d 889 (1960), 229 Md. 486, 184 A.2d 823 (1962), *cert. denied*, 374 U.S. 841, 83 S.Ct.

1895, 10 L.Ed.2d 1062 (1963), the *Wilhelm* Court, in its exhaustive discussion of improper comments, held that other considerations as to whether improper remarks warranted reversal are (1) whether the assailed argument constituted a material factor in the conviction (*Wilhelm*, 272 Md. at 431, 326 A.2d 707); (2) whether the comments related to a matter outside the record (*id.* at 435, 326 A.2d 707); (3) whether the evidence concerning appellant's guilt was not "close," but was rather "overwhelming," (*id.* at 437, 326 A.2d 707); (4) whether there was evidence that the proceeding was "dominated by prejudice and passion," (*id.* at 445, 326 A.2d 707), and ultimately, what exceeds the limits of permissible comment depends upon the facts in each case (*id.* at 415, 326 A.2d 707).

The State, in oral argument before us, makes the point that argument by counsel should be robust and, indeed, the Court of Appeals in *Wilhelm*, citing *Dunlop v. United States*, 165 U.S. 486, 17 S.Ct. 375, 41 L.Ed. 799 (1897), observed, "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Wilhelm*, 272 Md. at 414, 326 A.2d 707.

More directly on point, in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), the Supreme Court considered the following closing argument by the prosecutor:

> As far as I am concerned, and as [defense counsel] said as he identified this man *this person, as an animal, this animal was on the public* for one reason. He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash. I wish

> [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [petitioner's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun. I wish someone had walked in the back door and blown his head off at that point. He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself. I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time.

The above argument had been made in response to the petitioner's closing argument to the jury:

> The first witness you saw was Mrs. Turman, who... had her husband slaughtered before her eyes, by what would have to be a vicious animal. And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. . . . *It's the work of an animal*, there's no doubt about it.
>
> So they come on up here and ask Citrus County people to kill the man. . . . The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do.

Petitioner had been on a weekend furlough from a prison sentence when he committed the crime for which he was subjected to the death penalty. In ultimately holding that, "Darden's trial was not perfect—few are—but neither was it fundamentally unfair," *id.* 477 U.S. at 183, 106 S.Ct. at 2472, the Supreme Court noted that the prosecutor's argument did not manipulate or misstate the evidence nor implicate other specific rights, such as the right to counsel or the right to remain silent. The Court also observed that the objectionable comment was invited by or was responsive to the opening statement of the defense which the Court held, "is used not to excuse

improper comments, but to determine their effect on the trial as a whole." *Id.* 477 U.S. at 182, 106 S.Ct. at 2472. Moreover, under a Florida Rule of Procedure, petitioner was allowed to give a rebuttal summation to the prosecutor's closing argument because, under the rule, he had been the sole witness in his defense. Accordingly, the Court held, petitioner's counsel was able to use this opportunity for rebuttal "very effectively, turning much of the prosecutor's closing argument against them by placing many of the prosecutor's comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner."

Notably, the Court held:

> The prosecutors then made their closing argument. *That argument deserves the condemnation it has received from every court to review it*, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because [petitioner] was on weekend furlough from a prison sentence when the crime occurred. Some comments implied that the death penalty would be the only guarantee against a future similar act. Others incorporated the defense's use of the word "animal."

Darden, 477 U. S. at 180-81, 106 S.Ct. at 2471.

In *Keene Corp., Inc. v. Hall*, 96 Md.App. 644, 666, 626 A.2d 997 (1993), appellee's counsel declared:

> Judgment day is a day for you to tell these defendants that after you've received the evidence you see them for what they really are, and that is a bunch of corporate liars, a bunch of corporate mutilators, a bunch of corporate murderers. You see—
>
> [APPELLEE'S COUNSEL]: I object. . . . Corporate

murderers? . . . I—I move for a mistrial.

Counsel for appellee, after the court's denial of the motion for mistrial, advised the jury that, like opposing counsel who had stated that he formerly was a State's Attorney, appellee's counsel "used to prosecute cases in this courthouse and these defendants, these corporations—they are no different. They are no better than a common criminal walking on the streets." After a further objection, the trial judge reminded both attorneys that they were not trying a criminal case and "I think it's high time the jurors got to determining the issues in the case."

We recognize that *Keene Corp.*, a civil case, does not implicate the constitutional imperatives of a criminal trial; however, we believe the holding is pertinent to the ultimate goal in any trial, i.e., the search for truth. Judge Diana Motz, speaking for this Court, denounced counsel's argument:

> On appeal, the [appellees] do not assert that the remarks were proper. They clearly were not. As Chief Judge Wilner recently noted in another civil case in which counsel used improper argument, it is "wholly inappropriate to accuse [the defendant] of 'theft,' or 'stealing,' or 'robbery.' There is no need for snide remarks, pejorative, and unfounded hyperbole or exaggeration, and they should not be permitted. The search for truth, which is supposedly the principal function of a trial, is assisted much more by light than by heat." We need not here determine if these improper remarks caused such prejudice as to require a new trial because a new trial is in any event required. We trust, however, that sort of argument will never again be made by the [appellees'] counsel.

Keene Corp., 96 Md. App. at 666, 626 A.2d 997 (citations omitted).

A review of the record in the case *sub judice* reveals that when the objection was made to the Assistant State's Attorney's characterization of appellant as "an animal," there was no ruling on the objection and the prosecutor—with what appeared to the jury to be the Court's tacit approbation—was permitted to proceed with her closing argument. Immediately thereafter, the prosecutor referred to appellant as "a pervert" who "sexually molested babies." The prosecutor then made an entreaty to each of the jurors *seriatum* asking that each juror envision the screams of the two young victims as they were sexually assaulted by appellant, which screams went unheeded.

On this appeal, appellant does not complain of the graphic and impassioned references to the silent screams of the victims; we view them, were they standing alone, as being within the parameters of the "ardor of advocacy." Appellant did not object at trial to being referred to as a "pervert," (just as he had failed to object to the references to silent screams), although on appeal he lumps that characterization along with the reference to him as "an animal" in contending that the comments amounted to an appeal to passion. Although WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY (1986) defines a "pervert" as "one who is given to turning away from that which is good or true or morally right," the appellation has come to be synonymous with that which is utterly debased and odious. As in the case of the reference to the silent screams, except in a very close case, we would not be inclined to find the reference to appellant as "a pervert," standing alone, reversible error even though the preferable

course would have been to refer to appellant's conduct as "perverse."

Indeed, the nature of the evidence presented certainly gives rise to the conclusion that the actions of appellant—assuming them to be true as we must—were perverse, to say the least. When viewed, however, in the context of the totality of the prosecutor's closing argument, given such odious offenses, it is ironic that resort to excessive appeals to passion are needed to secure a conviction when the nature of the charges and the evidence adduced, without embellishment, is inherently inflammatory, albeit properly so. The right to a fair trial and the search for the truth, however, should not be hampered or obfuscated by extreme appeals to passion calculated to inflame the jury.

When the reference to the silent screams and "pervert" are considered in conjunction with the characterization of appellant as "an animal," we believe the prosecutor, in her zeal, exceeded the bounds of proper comment. Not only is it inappropriate to refer to a defendant in a criminal case as "an animal," it may be argued that such a strategy, in some instances, could be counterproductive should the jury view the State as engaging in a personal contest with the defendant. It is incumbent upon the People's representative to maintain an air of dignity and stay above the fray.

In *Viereck v. United States*, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943), the Supreme Court decided a case involving violation of a statute requiring certain agents of foreign principals to register with the Secretary of State. In opining that "the purpose and effect of [the prosecutor's closing remarks to the jury] could only have been to arouse passion and prejudice," the Court admonished:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. 318 U.S. at 248, 63 S.Ct. at 566-67 (citation omitted).

In the present case, the trial judge failed to rule on the objection lodged by appellant's counsel, but rather permitted counsel to raise the decibel level from "animal" to "pervert." Then in an impassioned recapitulation of the evidence, the prosecutor presented graphic images of what admittedly is repugnant conduct. The proper course would have been for the trial judge, under the circumstances, to rule on the objection to the appellation, thereby affording counsel an opportunity to request a curative instruction to the jury.

In accord with the observation by the Supreme Court in *Darden* that the argument there "deserves the condemnation it has received from every court to review it," we also find such a reference beneath the dignity of the prosecutor's office and believe that the better practice would be to characterize a defendant's actions, rather than to engage in name calling.

Having concluded that the characterization of appellant as "an animal" was improper, our task, then, normally would be to decide whether the remark warrants reversal. That analysis would have been pursuant to the procedure we set out in *White v. State*, 66 Md.App. 100, 121, 502 A.2d 1084 (1986), in which we explained:

> The *Wilhelm* Court continued to state that the applicable test for prejudice is whether the reviewing Court can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.
>
> The Court then set out three factors to be considered in determining whether a prosecutor's remarks prejudiced the defendant: first, the closeness of the case; second, the centrality of the issue affected by the error; and third, the steps taken by the trial judge to mitigate the effects of the remarks.

(Citations omitted.)

Because a new trial is in any event required, we need not here determine if these improper remarks caused such prejudice as to require a new trial. We trust, however, that counsel in the future will refer to the *actions* of a defendant rather than resort to epithets, thereby avoiding the unnecessary risk of overturning any conviction obtained.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY THE MAYOR AND CITY COUNSEL OF BALTIMORE.

APPENDIX C

[Discussion between trial court and counsel on courtroom closure issue and trial court's ruling of October 21, 1997 in the Circuit Court for Baltimore City, Maryland, the Honorable Joseph P. McCurdy, Jr., *Johnny Walker v. State of Maryland*, Criminal Case Nos. 196285024, 26]

* * *

MS. RAMSEY: Also, there was another concern that the State has. Inasmuch as the case involves the testimony of child victims, the oldest victim is now 17, the youngest victim is 12, I would ask that there not be any other people in the courtroom, particularly, particularly members of the Defendant's family. The children are very intimidated and there have been situations in the past since the case has come in where there have been lots of family members and family members have said things to them, and they feel very frightened and very intimidated by that.

THE COURT: When you, when you call the witness, make that motion, and then I'll hear from Ms. Shelton and I'll deal with it at that time.

* * *

MS. RAMSEY: Your Honor, at this time, the State would like to renew its motion to have the courtroom emptied of any of the Defendant's relatives or -- with

respect to this case, inasmuch as the victims are child witnesses and they've had some problems in the past in terms of intimidation by the family of the Defendant. So, I would just ask that this courtroom be cleared of them at the time Tuleeya and Salauna Brown testify with respect to this, this matter.

THE COURT: How old are the witnesses, Ms. Ramsey?

MS. RAMSEY: The oldest witness is 17 and the youngest is 12.

THE COURT: And are the witnesses related to the Defendant's family?

MS. RAMSEY: Well, the Defendant is the stepfather of the witnesses. The mother of the children was in a relationship with the Defendant for 10 years. He lived in the family home during that period of time.

THE COURT: And have the children expressed -- the witnesses expressed any concern to you about testifying in the present [sic] of the Defendant's family?

MS. RAMSEY: Yes, they have, Your Honor. They have, and that's why I'm making the request of the Court, because they have expressed concerns in terms of having to testify in their presence.

THE COURT: Ms. Shelton, do you wish to be

heard?

MS. SHELTON: Except that we would object. We believe that these witnesses are not of tender years. And if the State felt there was some problems, then made [sic] arrangements to have them testify via the TV camera. But this is an open proceeding. My client's family has been very supportive throughout this whole situation. They are here, they've always been here. I don't believe that inside the courtroom they pose any threat. We don't believe that there ever has been a threat by the family with respect to these particular witnesses, and that's not their purpose for being here. If these witnesses made allegations, then now's the time to express them in front of -- in court and in an open courtroom. We believe that this should be an open proceedings [sic] and that their ages, Your Honor, would make them competent witnesses and, as I stated earlier, that there's nothing that would prēvent them from testifying in open court.

THE COURT: Okay. Well, certainly the Defendant has a right to a public trial and the public has a right to attend the trial, and the Defendant's family is part of the public. I do think, however, the Court is obliged to assure that witnesses are permitted to testify freely --

* * *

THE COURT: -- testify freely and without any fear of intimidation. And I understand that in a case such

as this where families are essentially -- wind up pitted against one another as a result of these allegations which are incredibly disruptive and destructive to a family that opinions can overflow on the witness and make the witness, whether the witness is a child or an adult, feel intimidated and feel threatened in some way, not only in the courtroom itself but after the proceedings are over, as to what the consequences of their testimony may be perceived to be by the family of the Defendant.

Considering all of that and considering the young age of the witnesses, even though they are old enough and competent, and also considering the fact that the quality of the witness's testimony is -- it is preferable, I think, under any circumstances to have live witness testimony before a jury to video testimony. And the benefit of permitting the Defendant's family to be present is far outweighed by the benefit to the jury of having live -- and the Defendant, for that matter -- of having live witness testimony.

I'm going to grant the State's motion and request that members of the Defendant's family be excused from the proceedings during the testimony of the child witnesses. Thank you.

* * *

Supreme Court, U.S.
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No. 98-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF MARYLAND,
Petitioner,

v.

JOHNNY WALKER,
Respondent.

On Petition For Writ of Certiorari To The Court of Special Appeals of Maryland

BRIEF FOR THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The National Center for Missing and Exploited Children (NCMEC) is a congressionally mandated, District of Columbia not-for-profit corporation organized to act as the national missing child clearinghouse, to assist law enforcement in locating and recovering missing children, and dedicated to raising awareness about child sexual exploitation. Since 1984, NCMEC has been committed to ending child abduction and child sexual victimization by providing technical assistance, training and support to law enforcement, prosecutors, direct-service providers, community supervision, courts, legislators, educators, researchers, families, parents and victims. See generally, 42 U.S.C. §§ 5771 – 5780.

NCMEC has an interest in the present case because it involves the overturned conviction of a defendant who raped and sodomized two young girls entrusted to his care over an 11-year period of time. Not only is NCMEC interested in seeing justice done in this case, but NCMEC is interested in preventing re-victimization that occurs when child victims are called upon to testify in the criminal trials of their abusers.

The conviction in this case was overturned based on the appellate court's misapplication of the constitutional standard that applies to courtroom closures. Settling the standard for partial closure of and/or exclusion of certain observers from public proceedings is important to ensure that victim witnesses can exercise the right to testify

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*This brief is filed with the written consent of both parties pursuant to Rule 37(2)(a). Counsel for amicus curiae authored the brief in whole and no other person or entity made a monetary contribution to the preparation or submission of the brief.

truthfully with a minimum exposure to trauma. Therefore, NCMEC supports the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Child sexual molestation can be very difficult to prosecute because often the only evidence is the testimony of the child victim.[1] Child victims can be reluctant to testify in open court, especially in the presence of their abusers.[2] In this case, the child victims testified freely in front of their abuser but expressed fear of their abuser's family. Upon the prosecutor's proffer that the young witnesses felt threatened, the trial court properly weighed the competing interests of justice and excluded the family members in question during the victims' testimony.

Because the Maryland Court of Special Appeals incorrectly applied the constitutional standard governing total court closures, as opposed to partial closures, and overturned the conviction based on the defendant's Sixth Amendment right to a public trial, this Court should articulate standards for partial closures.

NCMEC has consistently urged state legislatures and courts to adopt constitutional practices that minimize the trauma to the child victims and encourage their open and truthful testimony while protecting the rights of the

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[1] Mario Gaboury & Roslyn Myers, *Statutory Protections Shield Child Victims Who Are Called to Testify*, Sexual Assault Report, Sept./Oct. 1998, at 3.

[2] Debra Whitcomb, *When the Victim is a Child* 103 (1992).

accused.[3] NCMEC urges this Court to grant the Petition for Writ of Certiorari to address the constitutional standards that should apply to the exclusion of certain members of the public for limited purposes during a criminal trial. NCMEC hereby adopts and incorporates the facts and arguments presented by the Petitioner. In the interest of child victims, NCMEC augments such arguments with two other reasons why the Court should consider the question presented.

First, the issue of partial closure should be addressed because the presence of child victim witnesses in criminal trials will likely increase, and the likelihood that trial courts will address prosecution requests for limited closure of proceedings will also increase. Such partial closures do not run afoul of the Sixth Amendment right to a public trial. In fact, the Court has recognized child victims of sex crimes as among those whose interests compete with a defendant's interest in a public trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 614 (1982). It is critical that child victim witnesses be given the opportunity to testify in a safe environment where (1) they feel comfortable enough to testify about the abuse they suffered, and (2) the likelihood of further victimization is diminished.

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[3] National Center for Missing & Exploited Children, *A Report Card to the Nation: Missing and Exploited Children 1984-1994* at 15 (September 1994); A *Report to the Nation: Missing and Exploited Children* at 18-19 (January 1997); Jay C. Howell, *Selected State Legislation: A Guide for Effective State Laws to Protect Children* at 75-96 (Judith Drazen Schretter & Donna Castle Aspell, eds., May 1993) (1985).

Second, many states, including Maryland, have codified provisions for child victim witnesses that protect them during the criminal trial of their abusers. This includes videotaped testimony, courtroom privacy screens, closed circuit television, and partial closures. Partial closure, or exclusion of certain members of the public, does not deprive the accused of the right to a public trial even when there has been no case-by-case analysis required for total closures. To apply the standard governing total closures in cases of partial closure provides no greater measure of protection to the accused and is antithetical to the protection of child victim witnesses.

ARGUMENT

A. The Court Should Articulate The Proper Standard for Partial Closure of Criminal Proceedings under the Sixth Amendment to Minimize Further Victimization and Maximize Opportunity for Truthful Testimony by Child Victim Witnesses.

(1) The Sixth Amendment Right to a Public Trial is Not Abridged by a Partial Closure.

A criminal defendant's right to a public trial is personal to the defendant and constitutionally protected under the Sixth Amendment. *Gannett Co. v. De Pasquale*, 443 U.S. 368, 380 (1979) (while the press and others have a First Amendment right to attend a criminal trial, the right to a public forum is held by the defendant for his benefit). A defendant's right to a public trial under the Sixth Amendment guarantee is closely linked to the First Amendment because "[p]ublic scrutiny of a criminal trial

enhances the quality and safeguards the integrity of the factfinding process" so that a criminal defendant is more likely to have a fair trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. Not only does a public trial serve to ensure fairness that might be abridged by secret proceedings, the interests of justice are further served because "a public trial encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The right to a public trial extends to proceedings attendant to a trial, such as jury selection voir dire and suppression hearings. *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 – 511 (1984); *Waller v. Georgia*, 467 U.S. at 46. While the right to a public trial is expansive, it is not absolute. When a "compelling" or "overriding" interest is advanced, the trial court may order closure as long as it "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise Co. v. Superior Court*, 464 U.S. at 510. The interest must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* In order to meet the constitutional requirements under the Sixth Amendment, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48.

The Court has consistently held that cases of sex crimes against children are of the type where compelling or overriding interests may be advanced. *Id.* at 512 (stating

that the rape of a teenage girl may give rise to legitimate privacy interests of jurors who experienced similar assaults); *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 607 (stating that "protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner" are compelling).[4]

When a compelling interest such as the physical and psychological well being of a child sex abuse victim is at issue, mandatory and/or total closure of the courtroom is still not necessarily justified. *Id.* at 608. The trial court is required to "determine on a case-by-case basis whether the State's legitimate concern for the well being of the minor victim necessitates closure." *Id.* Such a case-by-case analysis to justify closure requires the court to consider the nature of the crime, the age, psychological maturity, understanding and wishes of the victim, and the interests of the parents and relatives. *Id.*

The contours of the Sixth Amendment right to a public trial have been defined in terms of mandatory or total closure to all spectators other than the parties and necessary court personnel. The Court has explained the constitutional underpinnings for ensuring a public trial and delineated the instances where the right gives way to another compelling interest. In order to justify a complete closure of the courtroom that renders the trial essentially

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[4] See also, *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 614 (Burger, C.J., and Rehnquist, J., dissenting) (arguing that the majority opinion was actually in discord with "clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors").

non-public, the Court has announced the standards for the inquiry and findings the trial court must effect. In the case on petition to the Court, there was neither total nor mandatory closure of the proceeding that would normally trigger the stringent rules developed under *Press Enterprise Co.* and *Waller.*

In cases such as this, the defendant's constitutional rights are not impaired as they may be when there is total or mandatory closure. In cases of partial closure, the fairness of the trial is maintained despite the limited exclusion of certain spectators. The proceeding is not rendered secret by limited exclusions. The integrity of the trial court's ability to adduce facts upon which the jury can rely and the defendant's right to cross-examine are preserved. In fact, in cases where child victim witnesses are called to testify, partial closure will help ensure that victim witnesses will come forward and testify truthfully. By its definition, a partially closed trial is narrowly tailored to exclude only a particular person or group of persons who present a threat to the victim witness's ability to testify openly and truthfully. Because the types of closures have widely varying degrees of impact on a defendant's Sixth Amendment rights, the Court should address what standard should apply to a partial closure, as opposed to a complete closure.

(2) Courts Have a Duty to Protect Child Victims.

Although courts and legislatures are responding to child victim issues more than ever, the justice system still has not adequately evolved to meet the special needs of child

victims, especially victims of sexual molestation.[5] Child victims deserve the greatest measure of protection available without impairing the right of the accused to have a constitutional trial. Courts and researchers have consistently recognized that a trial or other public proceeding is an environment that is intimidating to child victim witnesses. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608, 615-617 (Burger, C.J., and Rehnquist, J., dissenting).[6] In child sex abuse cases, not only has the child suffered the actual sexual victimization, but he may also be subjected to further trauma by participation in the criminal justice system when he testifies, is cross-

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[5] Nancy Walker Perry & Lawrence S. Wrightsman, *The Child Witness: Legal Issues and Dilemmas* 135-136 (1991)(describing the various responses at the trial court level to make children more comfortable in an intimidating surrounding).

[6] See generally, Jennifer Marie Batterman-Faunce & Gail S. Goodman, *Effects of Context on the Accuracy and Suggestibility of Child Witnesses, in Child Victims, Child Witnesses: Understanding and Improving Testimony* (Gail S. Goodman & Bette L. Bottoms, eds., 1993)(explaining the nature and effect of courtroom intimidation and trauma on child victim witnesses and suggestions for improving the legal response to their needs); and Rhona I. Flin, *Hearing and Testing Children's Evidence, in Child Victims, Child Witnesses: Understanding and Improving Testimony* 282-296 (describing the sources of stress on the child victim as studied in the British legal systems).

examined, and must face the defendant.[7] This added dimension of victim suffering is a relevant factor for the Court to consider when deciding whether a separate standard should apply to partial closures. Because truthful testimony is essential to a fair trial, every effort within constitutional and ethical boundaries should be made to accommodate the child victim who testifies in open court.

B. Because the Testimony of Child Victim Witnesses Is Often the Strongest Evidence in a Child Sexual Exploitation Trial, Constitutionally Sound Choices Should Be Available to the Trial Court and to the Witness.

Child advocates and jurists understand that while most children feel threatened and intimated by testifying and reliving their victimization, not all children respond in the same way to a particular type of accommodation that is offered to them.[8] Most states have enacted legislation intended to protect children from further victimization by permitting testimony by videotape and closed circuit television. At least 15 states and the federal courts permit

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[7] Perry & Wrightsman, *supra*, at 136 (citing Gail S. Goodman, et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims 71 (1990)).

[8] *Id.* at 136-137 (citing Gail S. Goodman, et al., *Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims* 83, whose "comprehensive study of the emotional reactions of child sexual assault victims, 65 percent" of the children studied experienced a range of harm from "'some distress'" to being "'very distressed'").

some type of statutory exclusion of spectators during the live testimony of a child victim. (See Appendix A)

The statutes permitting closure are, of course, not as expansive as the Massachusetts mandatory closure statute in question in *Globe Newspaper Co. v. Superior Court*. 457 U.S. at 601-602. In response to *Globe Newspaper Co.*, most of the closure statutes now contain language substantially similar to the test established by the Court. It is significant that legislatures have identified the need to respond to the plight of young children who are called to testify against their abusers. While it may be traumatic, it is usually necessary for the victim to tell the jury about the abuse he endured. While there is no way to fully protect child victim witnesses from greater harm, creating choices for the court and the victims to consider will help to curb further harm to the victim witness and encourage open and truthful testimony.

In this case, the child victims were willing and able to testify in front of their abuser. The trial court found that live witness testimony was preferable to closed circuit testimony. The court was presented with a proffer that the children, understandably, felt intimidated by the defendant's family members in the courtroom. However, it is irrelevant whether there were actual threats made. Since the witnesses perceived threats that could taint their testimony, the spectators were properly excluded for the limited duration of the victim's testimony. One of the articulated interests to be protected under the Sixth Amendment is truthful testimony, that was effected by exclusion of the courtroom spectators the witnesses perceived as threatening. *Waller v. Georgia*, 467 U.S. at 46.

Spectators have been properly excluded from courtrooms where there was a threat of harm from the spectators or where a witness had been threatened. See, e.g., *United States v. DeLuca*, 137 F.3d 24, 33-34 (1st Cir. 1998)(recognizing that while there is no settled law on partial closures, held that the stringent rules of the *Waller* test did not apply in partial closure contexts), *cert. denied*, 119 S. Ct. 174 (1998); *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979)(holding that for partial closure, a fact-finding hearing was unnecessary where an adequate affidavit supplied by the case agent supported the allegation that the witness had been receiving threats). While a partial closure is still a serious matter that may have an effect on the defendant's trial, the stringent rules that apply to complete closure are mitigated by the limited scope of a partial closure. Where the witness has been threatened or perceives a threat, the evidence adduced at trial risks taint.

When a child has been sexually abused and assaulted, especially for a protracted period of time, the only evidence of the crime(s) may be his testimony. Whether the threat to the child by certain spectators is real or perceived, the interests of justice are served by reasonable and constitutionally sound rules to permit partial closure, among other choices, to protect the child victim witness.

CONCLUSION

Because partial closure of a courtroom during a criminal trial is compatible with the Sixth Amendment; and, because exclusion of certain spectators may be necessary to ensure protection of, and truthful testimony from, child victims of sexual abuse; and, because the

stringent rules triggered to ensure constitutional protections that inure to the accused are inapplicable to partial closures, the Court should grant the Petition for Writ of Certiorari and rule on the standards that apply to partial closure.

Respectfully submitted,

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December 21, 1998

APPENDIX

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APPENDIX A:

Compilation of statutes permitting courtroom closure for protection of child victim witnesses 1a

APPENDIX A

At least fifteen states and the federal government have provided for courtroom closure procedures. The following highlights the elements of each statute.

FEDERAL PROVISIONS

- Whenever a child testifies
- Court may order exclusion of all persons not having a direct interest in the case, including the media
- Court may so order after a determination on the record that the child would suffer substantial harm or not be able to effectively communicate if he were required to testify in open court
- The order shall be narrowly tailored to serve the government's compelling interest. 18 U.S.C. § 3509(e)

STATE PROVISIONS

California

- Defendant must be charged with sex offense
- Child must be under 16 years of age
- Prosecutor must move to have the proceeding closed to protect the reputation of the child
- Court must conduct a hearing and consider the following factors: nature and seriousness of offense, age of child, extent to which the size of the community precludes victim anonymity, likelihood of public disgrace due to victim status, whether there is a substantial probability that witness identity would be disclosed, whether there is a substantial probability that disclosure of identity would harm witness, whether the witness has already made public disclosure, and any other factor the court considers in the interest of justice. Cal. Penal Code § 859.1.
- Courtroom closure may also be appropriate where there are no adequate alternatives or the witness's life may

be subjected to a substantial risk.

Florida

- Applies to civil and criminal cases concerning a sex offense
- Child witness must be under 16 years of age
- At the request of the victim or victim advocated, the court shall clear the courtroom of all persons except parties, immediate families or guardians, attorneys and their staffs, court officers and reporters, jurors, and news media. Fla. Stat. Ann. § 918.16

Georgia

- Applies to criminal cases concerning sex offense
- Child witness must be under 16 years of age
- When the child testifies concerning the offense, the court shall clear the courtroom of all persons except parties, immediate families or guardians, attorneys and their staffs, court officers and reporters, jurors, and news media. Ga. Code. Ann. § 17-8-54

Illinois

- In criminal prosecution for sexual crimes enumerated in the statute
- Victim is under 18 years of age
- While victim is testifying
- Court may exclude anyone who, in its opinion, does not have a direct interest in the case, except the media. 725 Ill. Comp. Stat. Ann § 5/115-11

Louisiana

- In cases of sexual crimes enumerated in the statute
- Victim is under 15 years of age
- *Sua Sponte*, or on motion of defendant or State
- Court may hear testimony in chambers or in closed session

- Must be in the presence of judge or jury; defendant, his counsel, and his family; victim's parent(s); State's attorney;
- May include reasonable but limited number of spectators allowed by the court's discretion
- May include any other party the court determines has a valid interest in the proceeding. La. Rev. Stat. Ann. § 15:469.1

Massachusetts
- At a trial for sexual crimes enumerated in the statute (as well as paternity and child-support trials)
- Victim is under 18 years of age
- Presiding justice shall exclude general public from the courtroom except persons having a direct interest in the proceeding. Mass. Gen. Laws Ann. ch. 278 § 16A

Michigan
- During preliminary examinations
- Applies to witnesses, witness testimony
- Court shall consider, among other factors, the age, psychological maturity, and wishes of the victim.
- Court determines on the record that it is necessary to protect the witness by excluding all unnecessary persons from the courtroom
- Transcripts shall be made available for a fee Mich. Comp. Laws Ann. § 600.2163a(9-10)

Minnesota
- At a trial for criminal sexual conduct
- Victim is under 18 years of age
- Judge may exclude public upon a showing, and specifying the reasons therefore, the closure is necessary to protect witness or ensure a fair trial for the duration of the victim testimony or the duration of the trial

- Parties shall have right to object prior to the closure order
- Only persons having direct interest in the case shall be admitted post-closure. Minn. Stat. § 631.045

Montana
- In an action for criminal conversation or seduction
- Court may direct a private trial by excluding all persons except court officers, the parties, their witnesses and counsel. Mont. Code Ann. § 3-1-313

New Hampshire
- Victim is under 16 years of age
- Victim testimony shall be *in camera,* unless good cause shown by defendant
- All evidence and testimony, including that of the victims, shall be available to the public. N.H. Rev. Stat. Ann. § 632-A-8

North Carolina
- At a trial for sexual crimes enumerated in statute
- During testimony of victim, trial judge may exclude all persons except court officers, defendant and those engaged in the trial. N.C. Gen. Stat. § 15-166

South Carolina
- The court must used closed or taped sessions when appropriate for witnesses who are very young, elderly, disabled or have special needs
- The prosecutor or defense attorney must notify the court when any witness or victim deserves special consideration. S.C. Code Ann. § 16-3-1550(E)

South Dakota
- Any portion of criminal proceedings (except grand jury) may be closed

- Where minor testifies concerning sex crime enumerated in statute
- Except to persons having an interest in the proceeding
- After a proper hearing, court may close proceeding to media and parents if it is in the best interests of the minor. S.D. Codified Laws § 23A-24-6

Virginia

- Trial of all criminal cases whether felony or misdemeanor
- Court may in its discretion exclude any persons whose presence would impair a fair trial
- Provided the defendant's right to a public trial is not violated. Va. Code Ann. § 19.2-266

Wisconsin

- When defendant is accused of sexual assault crime enumerated in the statute
- Upon the request of the victim and a finding that there exists a compelling interest such as emotional trauma or undue embarrassment
- Judge may exclude all persons other than court officers, victim's family members, defendant's family members, or others deemed by the court as supportive of them or otherwise required to attend.
- Additional factors that the court may consider in making these findings include, but are not limited to, the complainant's age, psychological maturity and understanding; the nature of the crime; and the desires of the complainant's family. Wis. Stat. Ann. § 970.03(4)